IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

FIRST APPEAL No 516 of 1979

For Approval and Signature:

Hon'ble MR.JUSTICE K.M.MEHTA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

HEIRS OF ISHWARBHAI H PATEL

Versus

LAXMIBEN D/D THR HER SOLE & ONLY LEGATEE AHMED UMARJI MUNSHI

Appearance:

1. First Appeal No. 516 of 1979

(MR PB MAJMUDAR) for Petitioner No. 1

MR NK MAJMUDAR for Petitioner No. 1/1-1/4

MR RM VIN for Respondent No. 1

CORAM : MR.JUSTICE K.M.MEHTA

Date of decision: 24/04/2002

ORAL JUDGEMENT

Heirs of Ishwarbhai Haribhai Patel-appellant original plaintiffs have filed this First Appeal against

judgement and decree dated 2.2.1979 passed by the learned Civil Judge (S.D.), Bharuch in Special Civil Suit No. 72 of 1974. The learned judge by his impugned judgement was pleased to dismiss the suit of the plaintiff with costs.

2. The facts giving rise to this First Appeal are as under:

2.1 There are some immovable properties situated at Moje Zadeshwar taluka, Bharuch District which have been described in Schedule A of the plaint and some properties situated at Moje Pipalia taluka, Bharuch District which have been described in Schedule B of the plaint. (Schedules A and B are attached with the plaint). It is the case of the plaintiff that Haribhai Raijbhai Patel who was father of the plaintiff had four sons, namely, Ishwarbhai Haribhai Patel, Mithabhai Haribhai Patel, Paragbhai Haribhai Patel and Lallubhai Haribhai Patel. As per the case of the plaintiff, they were members of the joint Hindu undivided family. Lallubhai Haribhai Patel died on 20.4.1973. Mithabhai Haribhai and Paragbhai Haribhai died without any heirs. Lallubhai Haribhai was the eldest brother of the plaintiff and he was managing the properties as Karta of the joint Hindu family. According to the plaintiff, the plaintiff filed present suit against Laxmiben, wife of Lallubhai Haribhai for declaration that he is the owner of the properties described in Schedules A and B of the plaint which are suit properties. The plaintiff also filed suit to recover possession of the properties which are described in Schedule B of the plaint. The plaintiff also claimed relief of permanent injunction to restrain the defendant and her agents etc. from recovering the possession and rent of the house which is described at item No. 1, Schedule 1 attached with the plaint and to restrain the defendant and her agents from recovering the possession of the Gobhan and to restrain her from recovering the amount of Rs. 3850/- plus interest thereon from the teachers co-operative society. The plaintiff also prayed for relief of partition and for separate possession of his one half share from the suit properties. In the alternative the plaintiff has also claimed relief of future mesne profits.

2.2 The case of the plaintiff as alleged in his plaint is that Haribhai was the father of the plaintiff. Mithabhai Haribhai, Paragbhai Haribhai and Lallubhai Haribhai were brothers of the plaintiff. It is further the case of the plaintiff that the plaintiff and his three brothers were members of the joint Hindu undivided family. It is further alleged that Lallubhai Haribhai was the eldest brother of the plaintiff and that he was

managing the properties as Karta of their Joint Hindu family. It was further stated that there were ancestral properties of the plaintiff and his brothers and that these properties were situated in village Zadeshwar taluka, Bharuch District. It is further stated that the plaintiff and his brothers had also purchased properties in village Pipalia taluka, Bharuch District from the income of their ancestral properties and that as Lallubhai was managing the properties, some of the properties were purchased in his name. He was managing all these properties. It was further alleged that the plaintiff was serving as Talati and that his brother Lallubhai was serving as teacher. It is further alleged that they were separate in food and residence but their properties were joint. The plaintiff further alleged that Mithabhai Haribhai and Paragbhai Haribhai died respectively before about 8 years and 10 years. It was stated that Lallubhai Haribhai died on 20.4.1973. The plaintiff further stated that Lallubhai was unmarried and that he has no issue. He has further stated that Mithabhai Haribhai and Paragbhai had also no issue. He further alleged that he has become sole owner of the suit properties. He has further stated that name of Lallubhai Haribhai was mutated in revenue record. The documents were executed in his name as he was the eldest member in the family and that he was managing the properties. He further alleged that his brother Lallubhai Haribhai had deposited a sum of Rs. 5000/- in Broach District Teachers' Co-operative Society. It is further stated that the amount belonged to their joint family. The plaintiff further stated that the deceased Lallubhai had also kept locker No. 448 in Broach Central Co-operative Bank Ltd. He has further stated that the deceased Lallubhai Haribhai was unmarried and that defendant Laxmiben was his servant. He further stated that he and his wife had brought the defendant from Nadiad for doing household work of Lallubhai Haribhai and the defendant was residing with the deceased Lallubhai at the time of his death. He further alleged that after the death of Lallubhai, the defendant had taken possession of all the properties as she was residing with him. It was further stated that the suit house was leased to one Vinodchandra Nageshwar and that he is occupying the suit house as tenant. He further alleged that after the death of Lallubhai Rs. 1200/- was withdrawn from the above teachers' society for performing the death ceremony of the deceased Lallubhai. The plaintiff further alleged that the defendant is not widow of the deceased Lallubhai and the defendant has tried to mutate her name in the revenue record alleging that she is the widow of deceased Lallubhai and that mutation entry No. 2774 dated

4.1.1974 has been made. It is further stated that a notice was served to him as required under Section 135-D of the Bombay Land Revenue Code and that he has also filed his objections against the above mutation entry. So the above entry has not yet been certified. He has further alleged that the defendant is in possession of the suit properties. It is further stated that on 13.7.1974 the plaintiff served a notice to the defendant. He has further alleged that the defendant has given a false reply to the notice. In view of the same, the plaintiff filed suit for declaration, permanent injunction and for possession of the suit properties. He has further claimed alternative relief for partition and for separate possession of his one half share in the suit properties. He has also claimed mesne profits and costs of the suit from the defendant.

2.3 The defendant appeared in response to the summons served to her. She has filed her written statement at Exh. 16 in which she has stated that the suit of the plaintiff was not true and that she did not admit its content. She further contended that the suit of the plaintiff was bad for non-joinder of the parties. The defendant further contended that the suit of the plaintiff was not maintainable. She did not admit that the plaintiff and his brothers were members of the joint Hindu undivided family. She did not admit that the deceased Lallubhai Haribhai was managing the properties as Karta of his joint family. She denied that there were ancestral properties of the plaintiff and his brothers in Zadeshwar. From the income of the above properties they purchased the properties in village Pipalia. She did not admit that the deceased Lallubhai purchased the above properties in his name as he was the eldest member in his family. She contended that Lallubhai Haribhai and his brothers were separate in all respect and that they were not members of the joint Hindu family. She did not admit that the deceased Lallubhai was unmarried. She contended that the deceased Lallubhai had married her according to Hindu rights and that she was legally wedded wife of the deceased Lallubhai. She denied that the plaintiff was the sole surviving co-parcener of his family. She did not admit that the suit properties were ancestral properties of the plaintiff and his brothers. She did not admit that the name of deceased Lallubhai was mutated in revenue record as he was the eldest member of the family. She also did not admit that Rs. 5000/- which was deposited in the Broach District Teachers' Co-operative Credit Society belonged to the joint family of the plaintiff and his brother. She further contended that the deceased Lallubhai was serving as teacher and he

was also doing business of money lending. She contended that the deceased Lallubhai had purchased the suit properties from his own income and that the suit properties were self acquired properties of the deceased Lallubhai. She further contended that the deceased had kept locker No. 448. She did not admit that she was servant of the deceased Lallubhai. She contended that she was the widow of the deceased Lallubhai. She further contended that the mutation entry No. 2774 was legal and valid. She further contended that she had given true reply to the notice of the plaintiff. She contended that she was the widow of the deceased Lallubhai and that she was in possession of the suit properties. She was cultivating the agricultural land of the deceased Lallubhai. She further contended that the plaintiff had nothing to do with the suit properties. She further contended that she was the only heir of the deceased Lallubhai and that she had become owner of the suit properties. She denied that the plaintiff has one half share in the suit properties. She further contended that she was in possession of all the properties of the deceased as she was his widow. She therefore urged to dismiss the suit of the plaintiff.

2.4 Before the trial court on behalf of the plaintiff, Ishwarbhai Haribhai has examined himself at exh. 129. He has reiterated what is stated in the plaint. The plaintiff has examined witnesses Vinodchandra Nageshar at Exh. 158. He has stated that he is native of Kaira District and he was residing in Zadeshwar since the year 1961-62. He was serving as surveyor in the office of Special D.L.R. Bharuch. He stated that he did not know that whether the plaintiff and his brothers were members of the joint Hindu family but they were staying together. The plaintiff has also examined Paragbhai Jethabhai at Exh. 162. who has a house in Zadeshwar. He has deposed that the plaintiff and his brothers were members of the Joint Hindu family. He stated that Lallubhai was karta of the family. On behalf of the defendant, Laxmiben has examined herself at Exh. 164. She has also deposed what is stated in her written statement. The defendant has also examined witness Maganbhai Khodabhai at Exh. 176. He deposed that deceased Lallubhai was serving as a teacher and the defendant is widow of the deceased Lallubhai and Lallubhai had married the defendant and he had attended the marriage of Lallubhai. He is residing in falia of Lallubhai. Another witness Bhailalbhai Zaverbhai Patel was examined at exh. 177. He happened to be neighbour of Lallubhai. He has deposed that Lallubhai was carrying on business of money lending and he was also serving as a

teacher. Another witness Keshrisinh Fulsinh was examined at Exh. 178. He has stated that he is residing in village Pipalia. He has deposed that Lallubhai was serving as teacher and he was also agriculturist. The defendant is widow of Lallubhai. She was not servant of Lallubhai. Another witness Maniben Amardas was examined at Exh. 179. She has stated that she was residing at village Pipalia. She knew Lallubhai. She has also stated that Laxmiben was widow of Lallubhai. Mukundbhai Haribhai Patel was examined at Exh. 183 who was serving in Railway as switchman. He has stated that he knew Laxmiben, the defendant. He has also stated that the defendant, Laxmiben's marriage was celebrated in his house at Nadiad.

2.5 The learned judge has considered oral as well as documentary evidence, namely, copy of assessment Register at Exh. 53, copies of record of rights at Exh. 54, 55 and 56. From these documents the defendant tried to show that there is nothing in the above documents to establish that the suit properties were ancestral properties of the plaintiff and his brothers and that the above properties were mutated in the name of Lallubhai Haribhai as karta of the joint Hindu family. The learned judge has observed that the plaintiff has produced mutation entries of the suit land at Exh. 112, 113 and 114. From that the defendant tried to establish that the land bearing survey No. 107 (new block No. 23/2) and sr. No. 364 (new block No. 190/1) were mutated on the name of Lallubhai as he was in possession of the above lands since many years and that land bearing S. No. 536 new block No. 215/1 was mutated in the name of Lallubhai as he had purchased the said land on 11.5.1960 from one Karsanbhai Zaverbhai. The mutation entries at Exh. 112, 113, and 114 are respectively dated 30.7.1967, 30.7.1967 and 9.9.1960. From these evidences the defendant has tried to show that the deceased Lallubhai had purchased the suit properties from his own income and the suit properties were self acquired properties of the deceased Lallubhai.

2.6 After recording the aforesaid evidence on record, the learned trial judge, considering the oral and documentary evidences, came to the conclusion that the plaintiff and Lallubhai Haribhai did not constitute the undivided Hindu family at the time of latter's death on 20.4.1973. The learned judge further held that the properties described in Schedule A and Schedule B were not ancestral properties of joint Hindu family of the plaintiff and the deceased Lallubhai Haribhai at the time of latter's death. The learned judge further held that

the defendant Laxmiben is the widow of the deceased Lallubhai Haribhai. On these grounds the learned judge has dismissed the suit of the plaintiff.

3. Being aggrieved and dissatisfied with the aforesaid judgement of the learned trial judge, the appellant has filed this appeal before this court in the year 1979. Mr. N.K. Majmudar, learned counsel for the appellant has submitted that the learned judge has erred in holding that properties mentioned at Schedule A and Schedule B were not ancestral properties of the joint family of the plaintiff and the deceased Lallubhai. The learned judge further erred in holding on issue No. 4 that the defendant is the widow of deceased Lallubhai. The learned judge further has erred in holding that the plaintiff is not entitled to any share in the properties described in Schedules A and B. He further submitted that the learned Civil Judge should have held that Zadeshwar house was purchased in their father's life time and because his father was staying with Lallubhai, it was purchased in the name of Lallubhai as Karta. He further submitted that the property at Zadeshwar that is Gabhan was joint family property. He has invited attention to oral as well as documentary evidence.

4. On the other hand the learned counsel for the respondent has also invited my attention to oral and documentary evidence in this behalf. He submitted that according to the plaintiff, the defendant was teacher and was also carrying on business of money lending. He further submitted that even 9 gunthas of land were in the joint name of Hindu family which was ancestral whereas the other property was in the name of deceased Lallubhai. He submitted that there was a distinction between ancestral property and the property purchased by Lallubhai. He submitted that Lallubhai had separate share of his income and the property which Lallubhai purchased was self-occupied property and nothing to do with the ancestral property. He has relied on extract from the assessment register at Exh. 53, 54, 55 and 56 of record of rights and mutation entries at Exh. 112, 13 and 114 and other documents in this behalf. He has further submitted that the defendant was legally wedded wife of Lallubhai and in support of the same oral evidence has also been recorded that Laxmiben was a widow of Lallubhai. He has further submitted that over and above the oral evidence there is documentary evidence, namely, joint photo of deceased Lallubhai and Laxmiben at Exh. 36/1, ration card at Exh. 165, voters card at Exh. 16 in which name of husband of the defendant has been shown as Lallubhai. He further submitted that Laxmiben

resided with Lallubhai right from 1959 and therefore there is legal presumption that Laxmiben was legally wedded wife of Lallubhai and therefore also the defendant Laxmiben was entitled to share in the property of the deceased Lallubhai. He has further submitted that over and above Lallubhai, Laxmiben died during the proceedings pending before the High Court and during the pendency of the proceedings, Civil Application No. 8320 of 1997 was filed before this court in which it was stated that Laxmiben had no issue of her own and she has also made a Will on 19.8.1992 and Ahmed Umarji Munshi was sole and only Legatee and only legal and valid heir of the deceased Laxmiben. According to the said application Laxmiben died on 1.12.1993. Death certificate and Will were produced and as per Section 273 of the Indian Succession Act, this court (Coram: S.K. Keshote, J) passed order dated 23.6.1998. In that order it has been stated that the applicant had been granted probate on the basis of the said Will by the competent court. It is stated that it has not been controverted by the learned counsel for the opponents. In view of the fact that Will has been executed in favour of the applicant by the deceased respondent and on that Will probate has also been obtained. The Civil Application was accordingly granted and the applicant Ahmed Umarji Munshi was ordered to be brought on record of First Appeal No. 516 of 1979. He further submitted that in view the same now the appellant cannot contend that the applicant is not legal heir of deceased Laxmiben.

5. I have considered the rival contention of the learned counsel for the appellant and the respondent. I have gone through the record particularly oral and documentary evidence at Exh. 53, 54, 55 and 56 of Record of Rights and other documentary evidence at Exh. 112, 113 and 114 to show that Lallubhai had purchased self-acquired property. It was mentioned that 9 gunthas which has been shown as ancestral land when the family wanted to have jointly ancestral property. It was stated that Lallubhai had purchased self-acquired property in this behalf.

6. I have also considered the ration card, voters' list, photograph and also oral evidence on record. In view of the same, Laxmiben is legally wedded wife of Lallubhai and she had share in the property.

7. In the result First Appeal is dismissed with no order as to costs.

(K.M. MEHTA, J)

(pkn)